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86-846

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

DAVID A. GOODMAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

1. Does a statute prohibiting the importation of certain firearms except if "imported for, sold or shipped to, or issued for the use of," a governmental agency provide adequate notice, under the Fifth and Sixth Amendments, that an individual who causes such firearms to be shipped from a bonded warehouse in the United States to a governmental agency commits a crime unless those firearms are also "for the use of" that agency?

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IN THE

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October Term, 1986

DAVID A. GOODMAN,

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v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on September 26, 1986.

OPINIONS BELOW

The order of the Court of Appeals denying Petitioner's appeal (App. 30) is reported at 800 F.2d 1140 (3rd Cir. 1986). The order denying rehearing (App. 34) is not reported. The opinion of the District Court denying a motion to dismiss or to quash the indictment (App. 1) is reported at 628 F.Supp. 323 (M.D. Pa. 1985); the opinion of the District Court denying the supplemental motion to dismiss and/or quash the indictment (App. 6) is

not reported; the denial of the post-trial motion (App. 9) is reported at 639 F.Supp. 802 (M.D. Pa. 1986).

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1986; a timely petition for rehearing, with suggestion for rehearing en banc, was denied on September 26, 1986. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and U.S. Sup. Ct. Rule 20, 18 U.S.C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fifth and Sixth Amendments to the Constitution of the United States and 18 U.S.C. §§2, 371, 922(1), 924, 925(a)(1) and (d) and 26 U.S.C. §5844 are set forth in the Appendix as Exhibits.

STATEMENT OF THE CASE

On or about May 30, 1985, petitioner, David A. Goodman, was indicted by the fourth grand jury empaneled to hear evidence in his case in the Middle District of Pennsylvania for (Count I) voting 18 U.S.C. §371 by willfully and knowingly combining, conspiring, and agreeing with John R. Ryczak, a federally licensed firearms dealer and police officer of the Archbald, Pennsylvania Police Department, and John E. McHale, the Chief of Police of that police department, to commit violations of 18 U.S.C. §2 and §922(1), a section of the Gun Control Act of 1968, by unlawfully and knowingly causing to be imported and brought into the United States, from West Germany, 24 Walther TPH .22 caliber pistols (hereinafter "Walthers") without the authorization of the Treasury Department as provided in 18 U.S.C. §925(d), in violation of 18 U.S.C. §371, and for (Count II) violating 18 U.S.C. §922(l) 924(a) and 2 by unlawfully causing the Walthers to be

imported and brought into the United States without authorization by the Secretary of the Treasury as provided in 18 U.S.C. §925(d).

Petitioner, a federally licensed firearms dealer and practicing attorney in Pittsburgh, Pennsylvania, filed a Motion To Dismiss and Quash the Indictment, since Interarms and not the Petitioner had imported the firearms and because the firearms had been "sold or shipped to," a police department in compliance with 18 U.S.C. §925(a)(1). Petitioner also filed a Supplemental Motion to Quash And/Or Dismiss the Indictment alleging therein that 18 U.S.C. §925(a)(1) is unconstitutional as applied and is void for impermissible overbreadth and vagueness in that men and women of common intelligence must necessarily guess at its meaning and differ to its application: that said statute permits wholly arbitrary, indiscriminate and capricious acts on the part of law enforcement officials in interpreting same to the detriment of the Petitioner, all in violation of the Fifth and Sixth Amendments to the United States Constitution. The District Court denied the motions.

On December 4, 1985 a jury, of the United States District Court for the Middle District of Pennsylvania, found Petitioner guilty of Count I, conspiracy. The jury, however, found Petitioner not guilty of Count II, the substantive offense of importing the same pistols. Petitioner, a first offender, was sentenced to imprisonment for a period of three years.[1]

---

1. On Friday, February 21, 1986, Chief Judge Nealon sentenced petitioner to a prison term of three years, none of which was suspended or probated. He also refused to grant his release pending appeal, finding that he was a "menace to the community". As justification for denying bail pending appeal, although bail was granted post-conviction and pre-sentence, the Court cited H.R. 3541, a bill introduced in the U.S. House of Representatives by Representative Kastenmeier (Democrat, Wisconsin) on October 9, 1985 and never passed. Representative Kastenmeier proposed to legislatively declare any violation of the Gun Control Act as "violent" for the purposes of release on bond, notwithstanding that the Act deals almost

Petitioner filed a post-trial motion seeking to set aside the verdict. The motion was denied and Petitioner is presently serving his three year term. *United States v. Goodman*, 639 F.Supp. 802 (M.D. Pa. 1986). (App. 10)

The Court of Appeals affirmed Petitioner's conviction on August 28, 1966. *United States v. Goodman*, 800 F.2d 1140 (3rd Cir. 1986). (App. 1) A timely petition for rehearing, with a suggestion for rehearing en banc, was denied on September 26, 1986. (App. 38)

REASONS FOR GRANTING THE PETITION

I. As Written, The Section Of The Gun Control Act Permitting An Exception To The Prohibition Against Importation Of Certain Firearms, If Such Firearms Are Shipped To A Governmental Entity, Fails To Provide Adequate Notice To An Individual, Under The Fifth And Sixth Amendments Of The United States Constitution That An Individual Who Causes Such Firearms To Be Shipped To A Governmental Agency Commits A Crime Unless Those Firearms Are Also "For The Use Of" That Agency.

Petitioner, who is a federally licensed federal firearms dealer and was a practicing attorney in Pennsylvania until suspension for conviction of this crime, meticulously analyzed the statutory provisions relating

NOTES *(Continued)*

in its entirety with regulation of the manufacture, importation, purchase, sale, receipt, transportation and possession of all privately owned firearms in the United States. The transformation by the Court of a *malum prohibitum* violation of the Gun Control Act into the equivalent of a violent crime, in the absence of any facts or duly enacted law to support it, resulted in the denial of bail pending appeal. While review was not sought on this ground, the Court's action underscores the ramifications of this case: there are estimated to be over 200,000,000 million firearms in the United States and more than half the nation's households contain at least one, the Gun Control Act regulating them all. *Weapons, Crime and Violence In America*, U.S. Justice Department, November, 1981.

to the importation of firearms and consulted with a distributor, Southern Gun in Florida, as to the proper procedure to be followed in the transaction at issue here. Thereafter, he advised the chief of police and one of the police officers of the Archbald Police Department on the preparation of a Purchase Order for his transmittal to the distributor who, in turn, forwarded the order to International Armament Corp. (hereinafter "Interarms"), a federally licensed importer.

Interarms filled the order for 24 Walthers from a quantity of 87, which it had imported in the normal course of business under an import permit approved by the Bureau of Alcohol, Tobacco and Firearms (hereinafter, "BATF"), to whom the Secretary of the Treasury had delegated its authority. The importation was not authorized pursuant to 18 U.S.C. 925(d). Instead the importation was authorized pursuant to 18 U.S.C. 925(a)(1), which provided:

> The provisions of this chapter, shall not apply with respect to the transportation, shipment, receipt, or importation of any firearms or ammunition **imported for, sold or shipped to,** or issued for the use of, the United States or any department or agency thereof, or any State or any department, agency, or political subdivision thereof. (Emphasis added).

The Petitioner is entitled to rely on the plain language of §925(a)(1). The statute declares that the provisions which were later cited in the indictment do not apply where the firearms are "sold or shipped to" a police department. Only BATF Ruling 80-8, which does not have the force of law or regulation, purported to add an additional requirement, that of an official department purchase order. That requirement was complied with. Not even Ruling 80-8 purports to require any statement on the purchase order that the firearms also are "for the use of" this department; nor does it require any state-

ments that the firearms, after receipt by the police department, will not be resold or transferred.

In fact, in a letter dated May 20,1980, issued prior to Ruling 80-8, BATF acknowledged that once firearms are imported pursuant to §925(a)(1), there is no prohibition against their resale. The District Court agreed, that resale could be immediate, yet charged the jury in an inconsistent and confusing manner.

During an intermediate charge to the jury on November 27, 1985, Judge Nealon instructed:

> Now, there is no law that prevents the police officer from selling that particular weapon after he acquires it: One hour after, or ten years after. I think I made the observation earlier that in certain instances you can see where it makes sense. . . . Now, as I will explain to you, I have ruled on the law that Walther TPH's can only be imported *for the use of* a police department or political subdivision." (Emphasis supplied).

Yet, in the final charge to the jury Judge Nealon stated, contrary to the language of §925(a)(1):

> The defendant concedes that the importation of the 24 Walthers from West Germany was not authorized by the Secretary of the Treasury under any of these four situations provided in 925(d), and indeed defense counsel pointed that out to you in her closing.
>
> However, under another section of the legislation, 18 United States Code 925(a)(1), firearms may be legally imported for the use of a political subdivision, such as a police department. And let me read 925(a)(1) to you. It says, "The provisions of this chapter, and the chapter meaning the Gun Control Law, and I think the witnesses have said that it's quite comprehensive, quite lengthy, and this is only one of the sections. The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or

ammunition imported for, sold or shipped to, or issued for the use of the United States or any department or agency thereof or any State or any department, agency, or subdivision — or political subdivision thereof.

I have held, as a matter of law, that any importation of firearms under Section 925(a)(1) is illegal unless it is for the use of a political subdivision such as Archbald Borough. As I mentioned to you before, you must accept my definition of the law, and not counsel's and not any of the witnesses, or not what you might think the law should be.

It is my responsibility to make a legal interpretation of the Statute, and *I have ruled that the phrase, "for the use of" a governmental subdivision, as contained in 925(a)(1), applies equally to importation, sales, and shipments, and not merely to firearms "issued."* I have held that the phraseology following a series of verbs applies to all verbs, including, in our case, the word "imported," *even where the word "or" is used* and does not apply only to the verb preceding it. That is, the verb "issued". I'm holding that that's what the law is. . . .

In other words [Defendant's counsel] argued that because it says — because the statute says, "imported for, sold or shipped to, *or* issued for the use of" that the phrase "for the use of" is limited to the word "issued" and that it does not apply to "imported for", or "sold or shipped to." I have held differently. *I have concluded that under the law the firearms must be imported for the use of a political subdivision.*

Petitioner read the statute as Judge Nealon did in the earlier part of his charge, i.e. that after the police department received the firearms they could transfer them to him or any other person in compliance with the law.

Based on that official purchase order from the Archbald Police Department (which is undeniably an agency of the Borough of Archbald, a political subdivision of the Commonwealth of Pennsylvania and which was signed by its highest authority, the chief of police, who is legally authorized to so sign), BATF authorized Interarms to withdraw the firearms from its bonded warehouse. The firearms were both "sold" and "shipped to" the police department directly, in redundant compliance with §925(a)(1). All entries of receipts and transfers were made according to law.

It is important to note that Petitioner and his alleged co-conspirators were not charged with making any false statement, or with defrauding anyone, or failing to pay any duty or tax owed or with engaging in the business of dealing in firearms without a license (both Ryzcak and Petitioner were separately federally licensed), or with violating any provision of the Gun Control Act in connection with any subsequent transfer of the firearms. Several weeks later, the police department transferred 22 of the original 24 Walthers to Petitioner.

The District Court refused Petitioner's points for charge on the definition of "import" and contrived a meaning of importation consistent with the government's position based on an isolated fact situation, not relevant to the case at bar, *Century Arms, Inc. v. Kennedy,* 323 F. Supp. 1002 (D. Vt. 1971) aff'd 449 F.2d 1306 (2d Cir. 1971) cert. denied, 405 U.S. 1065 (1972). The fact that goods may not be removed from a bonded warehouse without payment of duties does not delay the importation beyond the 12 mile limit of the territorial waters of this country. *Schiavone Chase Corp. v. U.S.* 553 F.2d 658, 663 (U.S.C.A. 1977). Petitioner's key importation points for charge, taken from Federal Jury Practice and Instructions, 3rd Edition, Civil and Criminal 1985

Cum. Supp. Devitt and Blackmar, requested that "import" be defined as:

> The bringing in or introduction of such an article into an area of the United States including a customs territory. . .; it is importing . . . when it is taken off the vessel; (*U.S. v. Gramlich*, 551 F.2d 1359 (5th Cir. 1977); *U.S. v. Prince*, 491 F.2d 655 (1974)) to import means to bring into the country. Those acts begin and end at the water's edge; (*Canton R. Co. v. Rogan et al*, 340 U.S. 511 (1951); [and] . . . the arrival of the merchandise through a port of entry. *Commonwealth v. H.C. Tombler Grocery Co.*, 6 Pa. Dist. 8, 9 (1896); *Franklin Sugar Refining Co. v. U.S.* 178 Fed. 743, 747 (E.D. Pa. 1910).

In *Schiavone*, supra, in order to convict the accused, the court was required to find that goods are "imported" once they are within the 12 mile limit of the territorial waters of this country. In the instant matter, in order to convict the accused, the court had to adopt a contrary definition, i.e. that importation did not occur until the goods were removed from the bonded warehouse even if that did not occur for five years after their entry at port. Such a result deprives individuals of the Equal Protection Clause of the Constitution and of the right to fair notice of the consequences of their acts. "There cannot be one construction [of the meaning of a term] for [criminal defendants] and another for the Department of Justice." *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954).

A narrow and reasonable reading of the *malum prohibitum* statute involved, 18 U.S.C. §925(a)(1), reveals that Petitioner's conduct was reasonable and lawful. *United States v. Bass*, 404 U.S. 336, 348 n. 15 (1971).

Moreover, in interpreting the statute, Petitioner looked to a parallel importation statute applying to a different category of firearms, i.e. machineguns and the like, 26 U.S.C. §5844:

> No firearm shall be imported or brought into the United States . . . unless the importer established, under regulations as may be prescribed by the Secretary, that the firearm to be imported or brought in is —
>
> 1) being imported or brought in *for the use of the United States or any governmental entity.*
>
> (Emphasis supplied)

The distinction between the two importation statutes became readily obvious. Because of the great potential for criminal use of machineguns, a far stricter requirement is imposed for their importation than for the Walthers.

Where Congress has the will of "defining what it desires to make the unit of prosecution" it has no difficulty in expressing it. "Any ambiguity should be resolved in favor of lenity." *Bell v. U.S.*, 349 U.S. 81 (1955); *Liparota v. U.S.*, 105 S.Ct. 1084 (1985). A statute such as §925(a)(1), however, that uses the disjunctive word "or" must be proved disjunctively. *United States v. Harrelson*, 705 F.2d 733, 736 (5th Cir. 1983).

Further, the legislative intent of the Gun Control Act of 1968, Public Law 90-618, U.S. Cong. and Adm. News, page 1397 resolves the ambiguity, as applied, in favor of Petitioner:

> PURPOSE
>
> Sec. 101. The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the

> purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the *acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity,* and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title. (Emphasis supplied).

The legislative history demonstrates that "or" is to be used disjuntively in its ordinary context. The starting point for interpreting a statute is the language of the statute itself and, absent a clearly expressed legislative intent to the contrary, the language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, (1980).

BATF is authorized under 18 U.S.C. §926 to seek a Congressional amendment to any statute under the Gun Control Act but has sought no clarification or amendment of the plain meaning of its §925(a)(1) since 1938.

The power of BATF, who initially interpreted the statute against Petitioner resulting in the indictment, "is limited by the scope of the statute". *F.C.C. v. American Broadcasting Co.*, supra, at p. 290. Yet BATF has, by overstepping its rule-making power, made the lawful acts of the Petitioner, criminal, depriving him of due process rights and the right to a fair trial.

The Court adopted the tortured meaning of BATF, creating an ambiguity where none previously existed and then construing said ambiguity against Petitioner, contrary to this Court's applicable decisions, and refusing relevant points for charge: where an act is capable of two interpretations, one consistent with innocence and

the other consistent with guilt, jurors must draw the inference consistent with innocence, *U.S. v. Universal Corporation CIT*, 344 U.S. at 221, 222 (1952); *U.S. v. Currier Lumber Co.*,70 F.Supp. 219, 221 (D. Mass. 1947); *Toussie v. U.S.*, 397 U.S. 112 (1970); penal statutes must be strictly construed so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *U.S. v. Enmons*, 410 U.S. 395 (1973); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Rewis et al. v. United States*, 401 U.S. 808 (1971).

At least two circuits have explicitly recognized that where there is confusion or ambiguity in a criminal statute, it must be resolved in favor of the defendant. *U.S. v. Anzalone*, 766 F.2d 676 (1st Cir. 1985); and *U.S. v. Insco*, 496 F.2d 204 (5th Cir. 1974). Similarly, in the circuit in which Petitioner was tried and convicted the appellate court has stated that penal statutes are to be sufficiently defined and strictly construed so as to warn ordinary people in language they can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *U.S. v. Allen*, 566 F.2d 1193 (3d Cir. 1977). Yet the trial court refused such a point for charge. This is particularly egregious in light of *U.S. v. Jessup*, (App. 41), United States District Court for the Western District of Pennsylvania, Cohill, J., Crim. No. 85-150, decided immediately prior to trial of Petitioner, appealed to the United States Court of Appeals for the Third Circuit by the government at 85-3614 and ordered dismissed upon motion of the government, after conviction of Petitioner herein.

The failure to have a uniform standard for interpreting statutes which, as applied, are ambiguous violates the constitutional principles protected and articulated by this Court.

CONCLUSION

A post-indictment judicial interpretation of what appears to be a plain meaning statute both on its face and as compared to other analogous statutes deprives a criminal defendant of fair notice. In the instant case, the court gave a tortured interpretation to 18 U.S.C. §925(a)(1). Because of the importance of the fair notice requirement of the Fifth Amendment and its impact on an individual's Sixth Amendment right to a fair trial, this Court should grant a writ of certiorari to review the opinions of the District Court of the Eastern District of Pennsylvania and to vacate the judgment entered thereon by the Court of Appeals.

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 85-00105

UNITED STATES OF AMERICA
v.
DAVID GOODMAN

Memorandum and Order Filed September 17, 1986

Defendant Goodman was indicted for willfully and knowingly conspiring and agreeing with others to commit violations of 18 U.S.C. §922(1)[1] and 18 U.S.C.§(2) by importing and bringing into the United States twenty-four (24) West German Walther semi-automatic pistols without the authorization of the Secretary of the Treasury as provided by 18 U.S.C. §925(d)[2]

Defendant has moved to dismiss or, in the alternative, to quash the indictment, *see* Documents 48 and 55 of the Record, arguing that 18 U.S.C. §925(a)(1) exempts the transaction; that he is the subject of selective prosecution; and the transference of evidence from one grand jury to another was improper. The Government by brief dated *August 30, 1985* has opposed the motion. For the reasons set forth below, the Motion to Dismiss or, in the Alternative, to Quash the Indictment will be denied.

1. This section provides, as follows:
Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

2. Section 925(d) allows for importation where specifically authorized by the Secretary of the Treasury.

The court finds unpersuasive the theory that 18 U.S.C. §925(a)(1)[3] exempts defendant's transaction(s). Defendant argues that §925(a)(1) as written exempts the transaction because the firearms were shipped to a political subdivision, *i.e.*, the Archbald Police Department. It is his contention that all such importations are exempt and that only those firearms that were "issued for the use of" any political subdivision, such as Archbald, would not be exempt under the facts presented in this case. He would confine, consequently, nonexempt status to an issuance, as distinguished from a shipment, receipt or importation. Congress could not have extended such an interpretation. While the defendant argues there is no support in case law that defendant has committed a crime, the court finds ample support that §925(a)(1) is not to be so narrowly construed. *See e.g., Perri v. Department of Treasury,* 637 F.2d 1332, 1337 (9th Cir. 1981) (Congress never intended that the Act could be circumvented where there was a *willful violation* simply because the government ultimately received the firearm.); *United States v. Brooks,* 611 F.2d 614, 617 (5th Cir. 1980) *overruled on other grounds,* 749 F.2d 203 (5th Cir. 1984) (This exemption "expressly covers only the 'transportation, shipment, receipt, or importation' " of firearms "for the use of the United States."); *Hyland v. Fukuda,* 580 F.2d 977, 979 (9th Cir. 1978) (§925(a)(1) exempts firearms owned by the state and used exclusively for its purposes). In *United States v. Mastro,* 570 F.Supp. 1388 (E.D.Pa. 1983), the court specifically held that the exemption

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3. This section states that:
The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

would not exonerate a defendant where the evidence established "that the guns were not shipped to or issued for the use of a governmental agency. . . ." *Id.* at 1392. "The Court cannot ascribe to Congress the intent to allow firearm purchasers to lie about their purchases so long as the gun is shipped to a state, agency, or political subdivision and can find no support for such an intent in §925(a)(1)." *Id.*

While distinguishing the cases the Government has cited, defendant cites no support for his interpretation of the exemption. Defendant has been indicted in Count 2 with causing the importation without authorization by the Secretary in violation of the Act and charged as a principal under 18 U.S.C. §2. If defendant caused the importation by members of the Archbald Police Department without the authorization, then the Act has been violated. The exemption of §925(a)(1) would exclude importation *for the use of* a political subdivision of any state. The Government has represented that defendant arranged for the importation with other accomplices from the Archbald Police Department and paid for the pistols knowing that they were not *for the use of* the Police Department. Such conduct would not come under the protection of the exemption.

Similarly, the court rejects defendant's argument of selective prosecution. *See Wayte v. United States,* 105 S.Ct. 1524 (1985). Defendant attaches copies of "The Shotgun News", a trade publication which lists advertisements by various individuals selling West German Walther semi-automatic pistols. Because none of these individuals have been prosecuted, defendant alleges he is a victim of selective prosecution. The court rejects this argument. *See Wayte, supra.* In *Wayte,* the Supreme Court stated that it was appropriate to judge selective prosecution claims according to ordinary equal protection standards. These standards require that a defendant

show that the enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. *Id.* at 1531.

Defendant's selective prosecution theory rests upon his argument that the instant prosecution is in retaliation for the civil suit filed by defendant against the Attorney General of the Commonwealth. The Government has stated, and defendant has not disputed, that the federal prosecutor responsible for the instant case was not aware that defendant had filed a civil suit until after the indictment was returned. Moreover, defendant's allegations are too vague and imprecise to warrant a hearing or further inquiry by the court.

Defendant's final argument is that the transference of evidence in this case from one grand jury to another without return to defendant where there is a hiatus between the two grand juries is improper is equally without merit. First, evidence may be transferred from one grand jury to a successive grand jury. *United States v. Slawik*, 408 F.Supp. 190, 210-11 (D. Del. 1976), *aff'd* 564 F.2d 90 (3d Cir. 1977). Second, defendant argues that there was long hiatus between the first and second grand juries while in the next breath, he accuses this court of refusing disclosure of that very information. The court will not sift through the barrage of motions filed by defendant to establish exactly where defendant requested this information and this court allegedly refused disclosure. This is clearly information to which defendant is entitled. The court will direct the Assistant United States Attorney to provide an affidavit(s) to defendant setting forth the term dates of those grand juries to which documentation submitted by Defendant Goodman was presented.

An appropriate Order will enter.

WILLIAM J. NEALON

Chief Judge, Middle District
of Pennsylvania

Dated: September 17, 1985

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 85-00105

UNITED STATES OF AMERICA
v.
DAVID GOODMAN

Memorandum and Order filed November 19, 1985

Defendant has been indicted for willfully and knowingly conspiring and agreeing with others to commit violations of 18 U.S.C. §922(1) and 18 U.S.C. §2 by importing and bringing into the United States twenty-four (24) West German Walther semi-automatic pistols without the authorization of the Secretary of the Treasury as provided by 18 U.S.C. §925(d). By Memorandum and Order dated September 17, 1985, this court denied defendant's Motion to Dismiss, or in the Alternative, to Quash the Indictment. *See* Document 56 of the Record. Presently before the court is defendant's Motion to Dismiss and/or Quash the Indictment in which he requests the court to reconsider its interpretation of 18 U.S.C. 925(a)(1). He also argues that the court's interpretation of the statute renders it unconstitutional for overbreadth and vagueness and violates the Equal Protection Clause. The court is not persuaded.

The statute clearly prohibits the importation of firearms into the United States except in four specific situations (not applicable here) where the Secretary of the Treasury may authorize the importation. The statute does not apply to importations for the use of a State political subdivision, such as Archbald Borough. 18 U.S.C. §925(a)(1).

The court also believes that the statute, as interpreted by the Agency, is not vague and is sufficiently definite so as to give fair notice as to conduct proscribed. Further, the court is not convinced by defendant's assertions that the statute is overbroad as interpreted.

> The purpose of Section 925(a)(1) of Title 18, United States Code is to permit importation of firearms for the exclusive use of government agencies. The statute was not intended and may not be used as a vehicle by which unimportable firearms can be introduced into ordinary commercial channels in the United States.

Ruling 80-8, Bureau of Alcohol, Tobacco and Firearms.

Finally, the court finds defendant's argument that the statute violates the Equal Protection Clause because there is no rational basis or compelling state interest which permits exempting political subdivisions and not individuals simply without merit.

In conclusion, the court finds unpersuasive defendant's renewed attempt to convince this court that 18 U.S.C. §925(a)(1) exempts defendant's transaction(s). *See* Memorandum and Order dated September 17, 1985, Document 56 of the Record. Statutes are to be given a practical interpretation which will not produce an absurd result. *United States v. Cruz*, 698 F.2d 1198 (11th Cir. 1983) *cert. denied* 104 S.Ct. 391 (1983) (criminal tax evasion case); *United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981) *cert. denied* 454 U.S. 940 (1981) ("Although it is true that, in general, a criminal statute must be strictly construed . . . it is also a well established rule of statutory construction that a court will presume against interpreting a statute in a way that will render it meaningless or ineffective.") (citations omitted). The Government alleges that defendant could not import these firearms directly but willfully caused the Archbald Police Department to order them ostensibly for official use, even though they were to be turned over to him for

sale or other nonofficial use. To interpret §925(a)(1) as permitting such a practice would render this exemption ineffective and meaningless.

An appropriate Order will enter.

WILLIAM NEALON

Chief Judge, Middle District
of Pennsylvania

Dated: November 19, 1985

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CRIMINAL NO- 85-00105

UNITED STATES OF AMERICA
v.
DAVID A. GOODMAN

MEMORANDUM AND ORDER FILED FEB. 12, 1986

Defendant David A. Goodman was indicted in two counts for (1) willfully and knowingly conspiring with two police officers of Archbald Borough, Pennsylvania, to import firearms into the United States contrary to the provisions of 18 U.S.C. §922(1)[1] and in violation of 18 U.S.C. §371, and (2) importing and bringing into the United States twenty-four (24) West German Walther semi-automatic pistols, without the authorization of the Secretary of the Treasury as provided by 18 U.S.C. §925(d),[2] in violation of 18 U.S.C. §§922(1) and 924(a). On December 4, 1985, after trial by jury, defendant was found guilty on Count I, but was acquitted on Count II.

1. This section provides, as follows:

Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

2. Section 925(d) allows for importation in limited circumstances, *e.g.*, for scientific or research purposes, as a curio or museum piece, etc., where specifically authorized by the Secretary of the Treasury. It was conceded that no authorization was sought or received in the present case.

On December 11, 1985, defendant filed a Motion entitled "MOTION TO SET ASIDE THE VERDICT *OR* FOR JUDEMENT (sic) OF ACQUITTAL *OR* FOR JUDGMENT N.O.V. *OR*, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL *AND* WITH REQUEST FOR LEAVE TO AMEND UPON REVIEW OF THE TRANSCRIPT." Document 100 of the Record (emphasis in original). In this motion, twenty-one (21) numbered errors were assigned in support of defendant's motion. By Order dated December 16, 1985, this court held that to the extent defendant was requesting leave to set forth additional grounds as trial error after reviewing the entire record, the motion was denied. *See* Document 101 of the Record (citing *United States v. Dansker*, 561 F.2d 485, 486 (3d Cir. 1977); Fed.R.Crim.P. 45(b); Local Rule 601.4).

By motion filed December 31, 1985, defendant requested an enlargement of time in which to file a brief in support of the December 11, 1985 motion. The reason cited was to await receipt of the transcript which was alleged to be necessary in order to prepare a supporting brief. By Order dated January 2, 1986, this court denied the motion for enlargement of time.[3] *See* Local Rule 601.5 ("Unless for good cause shown the court orders otherwise, post-trial motions may be decided without the transcript of testimony.")

On January 14, 1986, defendant's supporting brief not having been filed,[4] the court *sua sponte*, telephonically contacted defendant's attorney, Rochelle Friedman. In unequivocal fashion, Attorney Friedman told the court that she would not file a supporting brief in the absence of the transcript as ordered by defendant. The court then read Local Rule 601.5, *supra*, to counsel and informed counsel that if she would not file a brief, the

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3. Defendant's counsel was telephonically informed of this Order on January 2, 1986.

4. Defendant's supporting brief was due on January 10, 1986.

court would proceed to dispose of the motion without it. Defendant's counsel, in response, notwithstanding being advised of the local rule and being aware of the court's ruling that the brief would have to be filed within the 30-day period as required by Local Rule 602.1, directly stated to the court that a brief would not be filed until she received the transcript.

Out of an abundance of caution and because the Defendant, David A. Goodman, is a practicing attorney, the court, *sua sponte*, issued an additional order directed to the defendant himself granting him until January 24, 1986 to file a supporting brief in his own behalf if he so desired and the Government was allowed 20 days thereafter to file a responsive brief. Because no supporting brief was filed, it must be concluded that defendant decided to forego this opportunity. The Government's brief was filed Feburary 3, 1986. The motion is now ripe for disposition and, unless the court must bow to the decision of defendant and his counsel not to follow the court's ruling, the merits of the motion will have to be addressed without further input from the defense. For the reasons set forth below, defendant's motion(s) will be denied.

I. CONSPIRACY

With this background, the court will review the elements necessary to sustain the conspiracy conviction of defendant. Section 371 of Title 18 of the United States Code provides: "If two or more persons conspire either to commit any offense against the United States, or the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy . . ." each is guilty of the offense against the United States. A conspiracy is a combination of two or more persons to accomplish some unlawful purpose or to accomplish a

lawful purpose by unlawful means. To support a conspiracy conviction, four essential elements must be established: that the conspiracy charged was willfully formed and existing at or about the time alleged in the indictment; that the defendant willfully became a member of the conspiracy; that one of the conspirators committed at least one of the overt acts charged in the indictment; and that the overt act was knowingly done in furtherance of some object or purpose of the conpsiracy.

Count I of the indictment here alleges that from the summer of 1981 to about July 1, 1982, defendant, an attorney and licensed federal firearms dealer, willfully and knowingly conspired with John E. McHale, Chief of Police of Archbald Borough, and John R. Ryczak, a part-time patrolman,[5] to violate 18 U.S.C. §922(1) by unlawfully and knowingly causing to be imported into the United States from West Germany, Walther semi-automatic pistols (Walthers) without the authorization of the Secretary of the Treasury as required under 18 U.S.C. §925(d). As will be explained later in this memorandum, defendant could not purchase the Walthers on his own but an order could be legally placed with him by a Police Department which he, in turn, would have to order through the licensed importer. The indictment stated that the conspiracy consisted of an agreement by the co-conspirators that McHale would place official police purchase orders through defendant; that defendant would pay for the firearms; that, upon their receipt by the Archbald Police Department [Department], the firearms would be transferred to defendant and the Police Department would keep several of the weapons free of charge. Seven overt acts were identified, as follows: (1) during the summer of 1981, the initial arrangement was made between defendant and Ryczak, who was also a licensed firearms dealer, whereby the Department would order

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5. McHale and Ryczak entered guilty pleas to this conspiracy and testified as government witnesses.

the Walthers and defendant would pay for them and give the Department several free of charge; (2) the agreement by McHale and Ryczak during the summer of 1981 under which McHale would order the firearms through an Archbald Police Department Purchase Order so long as defendant paid for them; (3) the mailing on September 16, 1981, of Archbald Borough Purchase Order No. 240 for the Walthers from McHale and Ryczak to defendant in Pittsburgh; (4) on September 18, 1981, defendant made the arrangements for the 24 Walthers to be sold to the department; (5) the entry by Ryczak on February 1, 1982, in his Federal Firearms Record Book that he had acquired the 24 Walthers from the Department; (6) the transfer on February 10, 1982, of 22 Walthers from Ryczak to defendant; and (7) the payment on March 9, 1982, of $8,996.43 from defendant to Southern Gun Distributors, Inc. for the 24 weapons.

As a preliminary matter, the court finds that under Local Rule 401.5, defendant's failure to file a supporting brief results in that motion being deemed withdrawn. Anticipating that this case will be appealed to our Third Circuit Court of Appeals, this court will address the merits of the generalized arguments raised in defendant's December 11, 1985 Motion in the event the Court of Appeals will not agree that the motion can be considered as having been withdrawn.

II. MOTION FOR JUDGMENT OF ACQUITTAL

Viewing the facts in the light most favorable to the Government, as the court is required to do on a motion for judgment of acquittal,[6] the following facts emerge:

6. A Motion for Judgment of Acquittal must be granted "if the evidence is insufficient to sustain a conviction of the offense charged in the indictment." Fed.R.Crim.P. 29(a). The standard of review is whether the jury's verdict is supported by substantial evidence viewing the evidence in a light most favorable to the verdict-winner. *See Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Delerme*, 457 F.2d 156, 160 (3d Cir. 1972).

Defendant is an attorney who specializes in representing clients engaged in buying and selling firearms. He has also been a federal firearms licensee since 1964 and is licensed to buy and sell, *inter alia*, handguns, shotguns, and rifles under the trade name American Armaments. The Walther TPH is a semi-automatic 22-caliber pistol that is manufactured in West Germany. It is a sought-after weapon and is considered to be "the Mercedes Benz" of small handguns. The exclusive importer of Walther TPH firearms into the United States is International Armament Corporation, trading as Interarms. A licensee, such as defendant, cannot directly order Walther TPH's from Interarms for his own personal use or for purposes of resale. In fact, under the Federal Firearms Act, 18 U.S.C. §921, *et seq.*, Interarms can import these weapons into the United States only in certain limited circumstances, *e.g.*, for sale to the United States, or a state or political subdivision thereof, including a Police Department, *See* 18 U.S.C. §925(a)(1).[7] While defendant knew that he could not order Walther TPH's directly from Interarms, he also knew that the pistols could be purchased through Interarms by submitting a Police Department Purchase Order signed by a Chief of Police.

In September 1981, defendant met John Ryczak, also a licensed firearms dealer who was a part-time policeman in Archibald Borough, Pennsylvania. Defendant inquired about the Archbald Police Department gun inventory and was told by Ryczak that it was a small department consisting of a Chief of Police, three full-time and several part-time police officers, and that the department itself didn't own any guns. Defendant advised

7. 18 U.S.C. §925(a)(1) provides:

(a)(1) The provisions of this [firearms] chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm of ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Ryczak that if the Archbald Police Department would order some Walther TPH handguns, he would pay for all of them and allow the Borough to keep some while the balance of the guns would be sent to him. Sometime later in September, defendant called Ryczak on the telephone and asked if Ryczak could arrange for the Archbald Police Department to order 24 Walther TPH's. Defendant advised Ryczak that, after delivery of the Walthers to the Borough, 22 guns should be sent to him and the Borough would be allowed to keep two. Ryczak then approached Police Chief John McHale and told him that he had met a firearms licensee who told Ryczak that he could get two firearms for the Department if McHale would order a larger quantity on behalf of the Borough. McHale said that he doubted that this kind of a transaction was legal but was advised by Ryczak that it was. Ryczak made a phone call to defendant who repeated to McHale that such a transaction was legal. After this conversation, McHale agreed to sign Archbald Purchase Order 240 in blank as requested and gave it to Ryczak. Ryczak called defendant and, pursuant to defendant's request, typed in an order for 24 Walther TPH's on the Purchase Order. Then, in compliance with their arrangement, Ryczak transmitted the Archbald Purchase Order dated September 16, 1981, to defendant who, in turn, submitted the order with an accompanying letter dated September 18, 1981, to Southern Gun Distributors (Southern). In the September 18th letter, defendant advised Southern that the enclosed order was a law enforcement order and verification could be obtained by calling John McHale, Chief of Archbald Police Department. Southern submitted Archbald Purchase Order 240 to the importer, Interarms. Interarms, as required by law, attached Purchase Order 240 to a United States Department of Treasury Form 6, which was filled out by Interarms personnel noting that the order was "for official use only as per attached purchase order." The purchase order and Form 6 were then forwarded to the Bureau of Alcohol,

Tobacco and Firearms office (BATF) for the required approval. The application was submitted to BATF on September 30, 1981,[8] importation was approved on November 5, 1981 and the application returned to Interarms for further processing. The next step that Interarms had to take in order to obtain release of the 24 Walthers from the bonded warehouse in Alexandria, Virginia, was to pay the appropriate duty to United States Customs. A Customs Stamp indicating duty payment was then placed on Treasury Form 6A and the weapons were withdrawn from the warehouse on January 8, 1982, the date the Customs Stamp was obtained.[9] On January 18, 1982, the 24 Walthers were shipped by United Parcel Service [UPS] from Interarms to Archbald Borough. The UPS driver delivered them to Ryczak personally because no one was present at the Archbald Police Department when delivery was attempted. Ryczak received the Walthers sometime near "the end of January" and, in a subsequent telephone conversation, defendant directed him to enter the 24 firearms in Ryczak's Firearms Book as having been purchased by Ryczak from Archbald Borough on February 1, 1982, and to indicate that 22 were sold to defendant on February 10, 1982.[10] The 22 Walth-

8. A representative of BATF called the Archbald Police Department to verify the purchase and a person called back identifying himself as Chief of Police John McHale and stated that the firearms were for departmental use.

9. The 24 firearms were part of a larger shipment of 200 Walthers previously obtained by Interarms from West Germany on December 30, 1981, which arrived in Baltimore and were stored in Interarms bonded warehouse in Alexandria, Virginia. No firearms could be released without the required approval of BTAF and U.S. Customs. There is no evidence in the record that defendant had any knowledge of this shipment and storage when he submitted his order or, for that matter, in what manner Interarms would acquire the firearms he had ordered in September, 1981.

10. The two Walthers that were supposed to become Archbald Borough property were actually taken by McHale and Ryczak for their personal use and they never told any Borough official of the whereabouts of these weapons. Moreover, during the initial stage of

ers were shipped to defendant who paid Southern for the purchase of the 24 Walthers by check number 495 dated March 9, 1982, in the amount of $8,996.43.

Other evidence favorable to the Government bearing on defendant's intent, knowledge and wilfullness were (1) his request that Chief McHale sign an additional Archbald Borough letterhead in blank; (2) his statement in late 1981 or early 1982 to another licensed dealer, Douglas Oefinger, that he was going to get the Walthers through a police department (to which Oefinger replied "you're fucking nuts") whereupon defendant displayed the blank letterhead with Chief McHale's signature to Oefinger with the comment "I can get anything I want"; (3) his advice to McHale, after McHale continued to question the legality of the transaction, to tell anyone who asked about the purchase of the weapons by the Department that "it was a hedge against inflation"; (4) his failure to discuss the purchase with any other official of Archbald Borough; (5) his knowledge that Archbald had a small full-time police force consisting of the Chief and three policemen; (6) the entry defendant placed in his own Firearms Book as having acquired 22 Walthers from Ryczak and not from the Borough; and (7) his letters of October 27, 1981, to Ryczak and McHale in which he used deceptive language, *viz.*, telling Ryczak he would receive one Walther for himself at the law enforcement price for services expanded even though he knew Ryczak would receive the firearm free, as well as mentioning to McHale that weapons were being transferred by the Department for new weapons when such was not the case — defendant knew this because Ryczak had previously told him that Archbald Borough did not own any guns. Furthermore, defendant admitted that he knew he could not order Walthers directly from

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NOTES *(Continued)*

this investigation, Ryczak lied to BATF agents when he told them that defendant had paid $1,000.00 to Archbald Borough as part of this transaction.

Interarms for his personal use; that he knew Interarms was the sole importer of Walthers; that he told Ryczak that Walthers had to be purchased on an Archbald Borough Purchase Order signed by the Chief of Police; that he had read the applicable firearms law, including 18 U.S.C. §925(a)(1), prior to his involvement with to McHale and Ryczak; that he testified he could acquire an unlimited number of foreign firearms for resale so long as he could arrange a purchase through a police department, notwithstanding the fact that he, and not the police department, would pay for the weapons; that he instructed Ryczak to record the purchase in his Record Book as an acquisition from the Archbald Police Department (purportedly because he knew Archbald did not have a Firearms Acquisition Book); that the 22 Walthers were never intended to be for the use of Archbald Borough but were for him to possess or sell in the commercial market (commercial sales of some of these Walthers to third persons actually took place); and that he knew Walthers were a sought-after firearm because importation is restricted. A review of the recited facts leads the court to conclude that there was substantial, if not overwhelming, evidence from which a jury could conclude that defendant, along with McHale and Ryczak, willfully agreed to a plan to unlawfully import the Walthers knowing that the firearms were not for the use of the Department and knowing that such an arrangement was illegal. Additionally, each of the overt acts was established by competent evidence. The September 16, 1981, mailing of the Purchase Order to carry out the scheme; the September 18th order from defendant to Southern; the February 1, 1982, entry by Ryczak in his Record Book that he acquired the Walthers from the defendant; the February 10, 1982, transfer of the 22 Walthers from Ryczak to defendant and the March 9, 1982, payment of $8,996.43 from defendant to Southern for the weapons (overt acts 3-7) were not contradicted by

defendant. Of course, the Government is only required to prove one overt act. *United States v. Adamo*, 534 F.2d 31 (3d Cir.), *cert. denied*, 429 U.S. 841 (1976).

Defendant's primary argument at trial was that he did not, and could not, conspire or commit an unlawful act because his actions in arranging for the Archbald Police Department to order these restricted weapons, for which he paid, was permissible under 18 U.S.C. §925(a)(1). He contends that §925(a)(1) excludes firearms imported by a political subdivision such as Archbald Borough from the proscriptions of the Firearms Statute. He asserts that the reference in the statute to the words "for the use of" is limited to those firearms which are "issued" and not to firearms "imported." This position is based on his literal reading of 925(a)(1) which states that "(t)he provisions of this [Firearms] chapter shall not apply with respect to the transportation, shipment, receipt, *or* importation of any firearm . . . imported for, sold *or* shipped to, *or* issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." (emphasis added). He argues that because the disjunctive "or" is used in the statute that this allows the importation of any firearm so long as it is ordered by a political subdivision, such as Archbald Borough, even if it is not "for the use of" that governmental entity. According to him, the statute requires that the firearm be "for the use of" a governmental entity in order to escape the sanctions provided therein only when it is "issued" to such an entity. Therefore, since the Walthers were "imported" and not "issued", he is free, by his own testimony to purchase "six million foreign firearms" so long as he can get a Police Department to submit an order for that amount and BATF approves the Department's order. This is an absurd legal construction and would completely gut the Act which is intended to severely restrict

the importation of foreign firearms.[11] Penal laws are not to be construed in such a manner as to defeat the obvious intention of the legislature. *United States v. Lanni*, 466 F.2d 1102, 1109 (3d Cir. 1972). Support for the court's reading of §925(a)(1) can be found in *United States v. Bass*, 404 U.S. 336 (1971). In *Bass*, the defendant was convicted of possessing a firearm in violation of 18 U.S.C. §1202(a). That statute provided *inter alia:*

> Any person who—
>
> (1) has been convicted by a court of the United States . . . of a felony . . . and who receives, possesses, *or* transports in commerce or affecting commerce . . . any firearm shall be fined . . . or imprisoned. . . .

18 U.S.C. §1202(a) emphasis added).

Specifically at issue was the phrase "and who receives, possesses *or* transports in commerce or affecting commerce . . . any firearm." *See Bass, supra* at 339 (emphasis added). The question before the court was whether the "in commerce or affecting commerce" phrase applied equally to "possesses," "receives" *and* "transports" even though the disjunctive "or" and not "and" preceded the verb "transports." The court held it did in spite of the statute's disjunctive form. "While the statute does not read well under either view, 'the natural

11. As further support, the court cites Ruling 80-8 by the Bureau of Alcohol, Tobacco and Firearms [BATF]. *See* Government Exhibit 30. The ruling states: "The purpose of section 925(a)(1) is to permit importation of firearms for exclusive use of government agencies. The statute was not intended and may not be used as a vehicle by which importable firearms can be introduced into ordinary commercial channels in the United States." Letter from Lonnie J. Muncy, Chief, Imports Branch [BATF] to Importers (May 20, 1980) (informative letter regarding publication of ATF Ruling 80-8). The agency interpretation is consistent with the court's interpretation of 925(a)(1). Further, Ruling 80-8 was mailed to all licensed firearms dealers.

construction of the language' suggests that the clause 'in commerce or affecting commerce' qualifies all three antecedents in the list." *Bass, supra* at 339 (citations omitted). The court noted that the statute would have a "curious reach" were the phrase to only apply to "transports." *Id.* at 340. Similarly, §925(a)(1) would have a "curious reach" were this court to hold that "for the use of" applied only to "issued." *See also Lanni, supra* at 1109 ("We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean.") 18 U.S.C. §922(1) specifically declares it to be unlawful, with certain limited exceptions as heretofore noted, to import firearms into the United States. Such an exception is not presented here. Furthermore, when a question is presented as to statutory interpretation or the meaning of words used in a statute, it is a question of law for the court to determine. *See e.g., Stissi v. Interstate and Ocean Transport Co. of Philadelphia,* 765 F.2d 370, 374 (2d Cir. 1985) ("When a decision turns on the meaning of words in a statute or regulation, the decision is one of law which must be made by the court. . . . The application of a statute's terms to undisputed facts also is a question of law") (citations omitted); *Gaibis v. Werner Continental, Inc.,* 565 F. Supp. 1538 (W.D. Pa. 1983) *vacated and remanded on other grounds, sub. nom. Vosch v. Werner Continental, Inc.,* 734 F.2d 149 (3d Cir. 1984) *cert. denied,* 105 S.Ct. 784 (1985) ("It is clear that when a decision turns on the meaning or construction of words in a statute . . . then a legal question is presented for the court to decide.") As a result, because it is within the province of the court to decide the law, the jury should not have been permitted any interpretation of the law other than the court's. Great leniency was given to defendant throughout the trial in allowing him to repeatedly assert his interpretation of §925(a)(1) to demonstrate his intent, state of mind or lack thereof. To avoid

confusion for the jury as to what law actually applied, the court informed the jury of the court's interpretation. Indeed, toward the end of trial, the court noted that it had been forced to instruct the jury several times as a result of defense counsel's persistent challenges to the court's interpretation of the law in the presence of the jury and gratuitous comments made by defendant as to the correct interpretation of the law. As a result, the court finds defendant's assigned errors on this issue to be without merit.

It also appeared to the court that defendant was arguing that if imported firearms were "shipped to" a political subdivision, it was not necessary that the firearms also be "for the use of" that entity. Defendant's reading of the statute again, is primarily focused upon the disjunctive form of the statute. This court rejects defendant's literal reading for the same reasons expressed above. *See United States v. Bass, supra.* We cannot ascribe to Congress the intent to allow firearms dealers to increase their commercial inventory of restricted-import weapons by the simple act of merely placing orders through police departments and having the weapons shipped to that entity which will only act as a conduit in transferring them to the real purchaser. *See also United States v. Mastro,* 570 F. Supp. 1358, 1392 (E.D. Pa. 1983) (holding that §925(a)(1) would not exonerate a defendant where the evidence established "that the guns were not shipped to or issued for the use of a governmental agency. . . .); *United States v. Brooks,* 611 F.2d 614, 617 (5th Cir. 1980) *overruled on other grounds,* 749 F.2d 203 (5th Cir. 1984) (this exemption "expressly covers only the 'transportation, shipment, receipt, or importation' " of firearms "for the use of the United States."); *Hyland v. Fukuda,* 580 F.2d 977, 979 (9th Cir. 1978) (§925(a)(1) exempts firearms owned by the state and used exclusively for its purposes.); *Perri v. Department of Treasury,* 637 F.2d 1332, 1337 (9th Cir. 1981) (Congress never intended that the Act could be circumvented

where there was a willful violation simply because the Government ultimately received the firearm.).

An additional point emphasized by defendant during trial and mentioned in his post trial motion is that there could be no conspiracy to import the Walthers because the Walthers were not actually imported as a result of the Archbald Purchase Order but were received in the United States by Interarms as part of a larger shipment on December 30, 1981, which was prior to the final approval and withdrawal of the 24 Walthers from the Bonded Warehouse on January 8, 1982. Assuming, without conceding, that such an argument may have relevance as to Count 21 which charged defendant with the importation of the Walthers "on or about February, 1982", it has no relevance to the conspiracy count on which defendant was convicted.

The crime of conspiracy is completed with the performance of an illegal overt act in furtherance of the agreement's illegal objective. *See e.g., United States v. Abushi,* 682 F.2d 1289 (9th Cir. 1982); *United States v. Littlefield,* 594 F.2d 682 (8th Cir. 1979). It is not necessary that the illegal purpose be successful or the objective completed or even that the objective be possible. *United States v. Janotti,* 673 F.2d 578 (3d Cir.), *cert. denied,* 457 U.S. 1106 (1982). In the case *sub judice,* overt acts one through four occurred prior to the arrival of the larger shipment on December 30, 1981. As a matter of fact, BATF had approved the importation of the 24 Walthers on November 5, 1981. It would appear that the duty was not paid by Interarms and the weapons withdrawn from the warehouse until January 8, 1982, because the larger shipment, including the 24 at issue here, did not arrive in this country until December 30, 1981. The actual location of the weapons might have had some bearing on the substantive Count 2 but would be irrelevant to the conspiracy charge because the actual importation is not necessary to establish the conspiracy, all that is needed is an unlawful agreement to import and

the taking of an overt act to implement the agreement. Furthermore, there is no evidence that defendant was ever aware of the arrival date of the Walthers into the United States or when Interarms ordered them from West Germany.

Even assuming *arguendo* that the situs or time of importation was relevant to the conspiracy charge, the court reaffirms its holding that importation was not complete until the firearms were released with BATF approval and payment of custom duties made. *See e.g., Century Arms, Inc. v. Kennedy,* 323 F. Supp. 1002 (D.Vt. 1971), *aff'd* 449 F.2d 1306 (2d Cir. 1971), *cert. denied,* 405 U.S. 1065 (1972). *Century Arms*, written by then-district Judge Oakes, supports this court's definition of when the importation in this case was complete.

> The genesis of this suit is the Secretary of the Treasury's refusal, after October 22, 1968, to allow Century to "import" the firearms covered by the license issued by the Office of Munitions Control. "Importation" is used here in a narrow sense, as the guns are physically in the United States, but are being held in bonded warehouses . . . . When we speak of the Secretary's refusal to allow Century to "import" the guns, then, we mean refusal to allow Century to remove the guns from the warehouses and resell them to its customers.

Moreover, Judge Oakes' definition of importation, while in the context of a surplus military firearms case, was directed to 18 U.S.C. §922(1). Again, importation as such, if it had any relevancy, it would apply only to Count II, the substantive charge for which defendant was acquitted. The conspiracy, however, as noted *supra,* was complete with the commission of overt acts, some of which occurred, in any event, before December 30, 1981, the date of physical arrival of the guns.

In conclusion, there was overwhelming evidence to support defendant's conspiracy conviction. Furthermore, the court reaffirms its holdings as to correct interpretation of §925(a)(1) and as to the definition of importation. As a result, defendant's Motion for Judgment of Acquittal will be denied.

III. MOTION FOR A NEW TRIAL

Defendant states "[t]he interest of justice so requires a new trial," and "[t]he verdict is against the law and/or against the weight of the evidence." *See* Document 100 of the Record at 2 ¶ 7 & 8. A motion for a new trial, unlike a motion for judgment of acquittal, is based upon the weight of the evidence. *See* Fed.R.Crim.P. 33. In the court's view, the verdict clearly was not against the weight of the evidence and the motion will be denied.

Also related to the Motion for a New Trial is defendant's challenge that Judge Nealon served as trial judge and also served as judge for at least two of the four grand juries which heard evidence on this matter. Presumably, defendant is arguing that this creates some prejudicial effect. The proposition is so meritless that it is not deserving of any discussion.

As a catchall, defendant asserts "numerous" errors during the pretrial state and during the trial. The failure to specify and particularize those errors is in direct contravention of Local Rule 601.4. The court, however, does not believe any errors were committed and reaffirms its holding on the issues of selective prosecution, transfer of venue, interpretation and construction of 18 U.S.C. §925(a)(1) and its constitutionality as construed by the court in response to defense motions. *See* Memorandums and Opinions dated July 26, 1985, Document 31 of the Record (denying Motion to Transfer); September 4, 1985, Document 53 of the Record (denying Motion for Reconsideration of Motion to Transfer); September 17, 1985, Document 56 of the Record (denying Motion to

Dismiss, or in the Alternative, to Quash the Indictment); October 29, 1985, Document 65 of the Record (granting evidentiary hearing in light of Motion for Reconsideration of the Motion to Dismiss on Grounds of Selective Prosecution); November 19, 1985, Document 79 of the Record (denying, after evidentiary hearing, Motion for Reconsideration of the Motion to Dismiss on Grounds of Selective Prosecution); November 19, 1985, Document 80 of the Record (denying Motion for Reconsideration of Motion to Dismiss and/or Quash the Indictment).

Continuing with the litany of assigned errors in defendant's contention that the "jury was impermissibly influenced by the repetitive statements of the court" as to the correct interpretation of §925(a)(1). The court is confident that the record will disclose that this was necessitated by the conduct of counsel and defendant in their continued disagreement in front of the jury regarding the court's interpretation of §925(a)(1). To avoid any incorrect conclusion by the jury that they (the jury) had the opportunity to choose between the court's interpretation and the defense's interpretation, the court was forced to explain to the jury that it was the court's view of the law that was to prevail. The court, however, went to great lengths also to explain that the jury should consider defendant's legal interpretation of the statute as bearing upon his intent, willfullness or state of mind. The court finds no error. *See also* text *supra* at 16.

Finally, defendant contends that the court erred in refusing to give "numerous" proposed instructions. A review of those instructions illustrates that they were properly refused and the court finds no error. While there remain other errors listed by defendant, the court finds them to be so devoid of merit as not to warrant discussion.[12] Defendant's Motion for a New Trial will be de-

---

12. *See e.g.*, ¶4d: "The government charges that Defendant failed to obtain the authorization of the Secretary of the Treasury under 18 U.S.C. 925(d), (sic) yet the government indicated in its

nied.

An appropriate Order will enter.

WILLIAM NEALON

Chief Judge, Middle District
of Pennsylvania

Dated: February 12, 1986

ORDER

In accordance with the reasoning set forth in the accompanying Memorandum, IT IS HEREBY ORDERED THAT:

(1) Defendant's Motion for Judgment of Acquittal is denied.

(2) Defendant's Motion for a New Trial is denied.

WILLIAM NEALON

Chief Judge, Middle District
of Pennsylvania

Dated: February 12, 1986

NOTES *(Continued)*
trial brief that §925(d) was not at issue, which statement was reiterated during trial by A.U.S.A., Timothy B. Haney at side-bar." Document 100 of the Record at 2.

Exhibit D

March 13, 1986

UNITED STATE⅛¼_____
No. 86-5134

UNITED STATES OF AMERICA
vs.
GOODMAN, DAVID A., Appellant
(M.D. Crim. 85-00105-01) (9 (b) Bail)

Present: HUNTER and MANSMANN, *Circuit Judges*.

1. Appellant's motion for reconsideration of Motion for Release Pending Appeal,

2. Copy of Court's Order dated February 27, 1986, sent by the undersigned for the Court's information in the above-entitled case.

Respectfully,
Arpi Deratzouian
Deputy Clerk 7-5019

The foregoing Motion is denied.

By the Court
James Hunter, III
Judge

Dated: March 26, 1986

Exhibit E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 21, 1986

No. 86-5134 .

UNITED STATES OF AMERICA
vs.
GOODMAN, DAVID A.
David A. Goodman, Appellant
(M.D.Pa. Crim. 85-00105-01)

Present: BECKER and MANSMANN, *Circuit Judges*, and TEITELBAUM, *District Judge*.

1. Appellant's motion for this Court to take judicial notice of two developments which are relevant to the proceedings at bar but which were not considered by the lower court since trial ended December 4, 1985, and these new developments did not occur until June, 1986,

2. Appellant's motion for this Court to have the transcripts made of the hearings before the four Grand Juries filed, sealed and transferred to the Court of Appeals,

3. Appellant's Errata in Reply Brief, the above-entitled case submitted on briefs on August 20, 1986.

Respectfully,
Denise Trottie
Deputy Clerk 7-1092

The foregoing Motions are denied.

By the Court,
Edward R. Becker
Judge

Dated: August 27, 1986

Exhibit F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5134

UNITED STATES OF AMERICA,
v.
DAVID A. GOODMAN,
Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 85-00105)
District Judge: William J. Nealon, Jr., Chief Judge

Submitted
Wednesday, August 20, 1986
Before: BECKER, MANSMANN, *Circuit Judges*
and TEITELBAUM, *District Judge**

JUDGMENT ORDER

After considering the contentions raised by appellant(s), to-wit, (1) where a charging indictment does not state a crime, it is defective ab initio and must be dismissed; (2) it is the obligation of the trial court in a jury trial to explain the legal issues to the jury; to instruct them in language they can understand; and to instruct in accord with a party's contention if it is consistent with the evidence in the case; (3) when a prosecutor seeks and obtains an indictment against the defendant, knowing that he engaged in no criminal activity, there is a

*Honorable Hubert I. Teitelbaum, Chief United States District Judge for the Western District of Pennsylvania, sitting by designation.

presumption of grand jury impropriety and a particularized need or compelling necessity for permitting the inspection of grand jury minutes; (4) where a sentencing court imposes a harsher sentence on a defendant because he has chosen to stand trial rather than plead guilty; and where said court finds that a defendant lacks remorse or contrition because he continues to assert his innocence even at sentencing; and when said court considers inaccurate, inappropriate and inflammatory information presented by the government and further fails to abide by the doctrine of proportionality, defendant has been deprived of his rights under the fifth, sixth and eighth amendments to the Constitution of the United States; and also after considering the response of the government to these contentions, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By The Court,
Edward R. Becker
Circuit Judge
Attest:

Sally Mrvos, Clerk

Dated: Aug. 28, 1986

EXHIBIT G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5134

September 17, 1986

UNITED STATES OF AMERICA

v.

DAVID A. GOODMAN

ORDER

The motion is granted with filing as of the date of this order.

For the Court,

MOTION FOR EXTENSION OF TIME FOR FILING PETITION FOR REHEARING

Appellant, David A. Goodman, by his attorney, ROCHELLE S. FRIEDMAN, ESQ. moves this Honorable Court for an extension of time for filing a Petition for Rehearing under and pursuant to FRAP 40, and in support thereof sets forth the following:

1. On August 28, 1986, this Honorable Court entered a Judgment-Order in the above-captioned case affirming the judgment of the district court.

2. Said Judgment Order was not received by counsel for Appellant until September 8, 1986 at 6:00 p.m., ten (10) days after said judgment was entered.

3. Defense counsel was on vacation in California from August 28, 1986 through September 4, 1986, a copy of her airplane tickets being attached hereto, made a part hereof and marked Exhibit "A".

4. Defense counsel is a sole practitioner and has no employees, but to ensure that she would be immediately apprised

EXHIBIT H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5134

UNITED STATES OF AMERICA

v.

DAVID A. GOODMAN,

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges,* and TEITELBAUM, *District Judge**

The petition for rehearing filed by David A. Goodman, Appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

EDWARD R. BECKER
Judge

Dated: September 26, 1986

*As to panel rehearing only.

EXHIBIT I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5134

UNITED STATES OF AMERICA

v.

DAVID A. GOODMAN,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 2, 1986.

EDWARD R. BECKER
Circuit Judge

Dated: October 10, 1986

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106

October 10, 1986

Rochelle S. Friedman, Esq.
1125 Heberton St.
Pittsburgh, Pa 15206

Re: United States of America *vs.*
David A. Goodman, *Appellant*

No. 86-5134

Dear Counsel:

Enclosed herewith is a conformed copy of order filed today staying the issuance of the mandate to November 2, 1986, in the above-entitled case.

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,
Sally Mrvos, Clerk

By:_____
Betty J. Robinson,
Deputy Clerk
Direct Dial - 597-3136

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Criminal Action No. 85-150

THE UNITED STATES OF AMERICA
Plaintiff

vs.

HARRY JESSUP and ROSE JESSUP,
Defendants.

P-R-O-C-E-E-D-I-N-G-S

of BENCH MEMORANDUM given in the above-entitled action September 30, 1985 at Pittsburgh, Pennsylvania, by the HONORABLE MAURICE B. COHILL.

Appearances:

For the Plaintiff:
CHARLES DeMONACO, ESQUIRE
Assistant United States Attorney
6th Floor, Federal Court House
Pittsburgh, Pennsylvania 15219

For The Defendants:
DANTI BERTANTI, ESQUIRE
102 North Main Street
Greensburg, Pennsylvania 15601

KENNETH B. BURKLEY, ESQUIRE
P. O. Box 1063
Greensburg, Pennsylvania 15601

Court Reporter:
DONALD D. HARRINGTON
Room 1015A Federal Courthouse
Pittsburgh, Pennsylvania 15219

Proceedings recorded by mechanical stenography, transcript produced by notereading.

(September 30, 1985, 2:04 o'clock p.m.)
(In Open Court)

THE COURT: I've studied carefully the law in this matter and I'm going to follow the court in *Anzalone* and dismiss this case. And I'm going to read a bench memorandum which should, I hope, cover the thing for the purposes of appeal.

Presently before us is the Defendants' joint motion to dismiss this criminal action filed by the Government pursuant to 18 United States Code, Sections 2 and 1001, and 31 United States Code, Sections 5313 and 5322.

For purposes of this motion, we accept as true all factual allegations of the government. Specifically, what we must determine is whether the defendants had fair warning that their actions and non-disclosures subjected them to criminal sanctions under the above-mentioned statutes.

These defendants were severed from a multi-defendant, many-count indictment because only one count of that indictment pertained to them. That was Count 25, which charges as follows:

That the defendants, HARRY H. JESSUP and ROSE JESSUP, devised a scheme for avoiding the currency transaction reporting requirements of Title 31, United States Code, Section 5313 in that on or about September 29, 1983, and November 1, 1983, the defendants, HARRY H. JESSUP and ROSE JESSUP went to various financial institutions, and purchased cashier's checks totalling $19,700.00 on September 29, 1983 and $19,700.00 on November 1, 1983, in amounts less than $10,000, in order to avoid detection by the Internal Revenue Service, in that:

1. On or about September 29, 1983, the defendants, HARRY H. JESSUP and ROSE JESSUP, purchased and caused to be purchased a cashier's

check, payable to A. Langford, Surf-Coaster, remitter, HARRY JESSUP, in the amount of $5,700.00 from the First National Bank of Herminie.

2. On or about September 29, 1983, the defendant, HARRY H. JESSUP, purchased and caused to be purchased a cashier's check, payable to A. Langford, Surf-Coaster, remitter, HARRY JESSUP, in the amount of $7,000.00 from the Union National Bank.

3. On or about September 29, 1983, the defendant, ROSE JESSUP, purchased and caused to be purchased a cashier check, payable to A. Langford, Surf-Coaster, remitter, HARRY JESSUP, in the amount of $7,000.00, from Equibank.

4. On or about November 1, 1983, the defendants HARRY H. JESSUP and ROSE JESSUP purchased and caused to be purchased a cashier's check, payable to Surf-Coaster, remitter, HARRY JESSUP; in the amount of $9,700.00 from the First National Bank of Herminie.

5. On or about November 1, 1983, the defendant, HARRY H. JESSUP, purchased and caused to be purchased a cashier's check, payable to Surf-Coaster, remitter, HARRY JESSUP, in the amount of $5,000.00, from the Union National Bank.

6. On or about November 1, 1983, the defendant, ROSE JESSUP, purchased and caused to be purchased a cashier's check, payable to Surf-Coaster, remitter, HARRY JESSUP, in the amount of $5,000.00, from Equibank.

Now, if we were doing a written opinion in this case, we would make a chart. But I'll describe the chart as I mentally envision it for purposes of this bench opinion.

In the first column would be the dates of the transactions. In the second column would be the purchaser of the checks. In the third column would be the amounts of the checks. In the fourth column would be the name of the bank where the check was purchased. And in the last column would be the name of the remitter.

So, we had six transactions here and each of them, under those columns, would look like this: September 29, 1983; purchaser, Harry and Rose Jessup; amount of the check, $5700.00; place was at First National Bank of Herminie; and remitter was Harry Jessup.

Also, on September 29th, 1983; Harry Jessup was the purchaser; the amount of the check was $7,000.00; the place of purchase was the Union National Bank; and remitter was Harry Jessup.

Also, on September 29th; the purchaser was Rose Jessup; the amount of $7,000.00; the place of purchase was Equibank; and the remitter was Harry Jessup.

The next series of transactions allegedly occurred on November 1st, 1983; and here we had exactly the same type of transactions: Harry and Rose Jessup purchased a $9,700.00 certified check; the place was First National Bank of Herminie; and Harry Jessup was listed as the remitter;

> also, on November 1st, 1983; Harry Jessup purchased a $5,000.00 certified check at Union National Bank; and the remitter was listed as Harry Jessup;
>
> and the last transaction is that of Rose Jessup purchasing a $5,000.00 certified check at Equibank; and the remitter is listed as Harry Jessup.

Now, the Currency Reporting Act, 31 United States Code, Section 5311 *et seq.*, authorizes the Secretary of the Treasury to require domestic financial institutions, and any other participants in transactions for the payment, receipt, or transfer of United States currency, to

report said transaction to the Secretary. That's found at 31 United States Code, Section 5313(a). The Secretary has issued regulations requiring only financial institutions to file these reports. We note that the Secretary did not require individuals to file such reports. That is found at 31 C.F.R. 103.22. Pursuant to these regulations, as well as Section 5322(b) of the Reporting Act, 31 United States Code, Section 5322, financial institutions must report transactions in excess of $10,000.00, and transactions totalling more than $100,000.00 in a twelve month period.

We find the indictment here to be similar to the factual situation found in the recent case of *United States of American against Anzalone, 766 F.2d 676 (1st Circuit 1985)*. In *Anazalone, supra,* the appellant, on November 13th, 1980 had purchased three checks from Haymarket Cooperative Bank, all of which totalled more than $25,000.00 but none of which exceeded $10,000.00 individually. Also, between November 18th, 1980 and December, 1980, appellant Anzalone purchased nine additional checks totalling $75,000 00; but again none of the checks exceeded $10,000.00

Like the case before us, the appellant *Anzalone* challenged the application of the statutes in question, claiming unconstitutional vagueness and lack of due notice to him that his actions were proscribed by these provisions. The trial court ruled against *Anzalone* and he was convicted. However, on appeal, the United States Court of Appeals for the 1st Circuit reversed the appellant's conviction and dismissed the indictment.

As in *Anzalone,* we agree that 31 United States Code, Section 5313 imposed no duty upon Harry H. Jessup or Rose Jessup to inform the banks in question of any "structured" nature of these transactions. As the *Anzalone* court stated:

> "The application of criminal sanctions to appellant for engaging in the activities heretofore described violates the fair warning requirements of the due process clause of the Fifth Amendment." *Anzalone* 766 F.2d at 682.

Applying the rationale of *Anzalone* here, the alleged violations of 18 United States Code, Sections 2 and 1001 must fail because they depend upon the applicability of 31 United States Code, Section 5313 to the Jessups. If the Jessups had no duty to report to the Secretary of the Treasury either directly or through the financial institution, there can be no concealment in violation of 18 United States Code, Section 1001.

It is well established that criminal laws are to be strictly construed. See, e.g., *U.S. v. Emmons, 410 U.S. 396 (1973).* Further, "A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson, 461 U.S. 352, 357 (1983).*
Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. *U.S. v. Bass, 404 U.S. 336, 348 (1971).*

In reaching our conclusion, we are aware of the line of cases cited by the government and deciding otherwise and relied upon by the government. See, *United States v. Thompson, 603 F.2d 1200 (5th Circuit, 1979), United States v. Massa, 740 F.2d 629 (1984), United States v. Cook, 745 F.2d 1311 (10th Circuit, 1984),* cert denied, *105 Supreme Court 1205, 84 L. Ed. 2d. 347 (1985), United States v. Tobon-Builes, 706 F.2d 1092 (11th Circuit),* rehearing denied *716 F.2d 914 (11th Circuit,* 1983).

The *Anzalone* court distinguished Thompson as follows:

> "In *United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979)*, the chairman of the board of a bank, in order to finance a drug operation, divided a $45,000 cash transaction to his accomplice into five separate $9,000 bundles to avoid filing a report under the Reporting Act. The Court of Appeals sustained his conviction under said statute in the face of a vagueness challenge. It would appear that Thompson's position with the bank and the teller's reliance on his authority in not filing the report, partially explain the case's outcome. Certainly Thompson owed the bank a fiduciary and legal duty to disclose the nature of his transaction, a situation which is not duplicated in the present case.
>
> "Nonetheless, we still find troubling the court's ruling —" this is still continuing the quota — "Nonetheless, we still find troubling the court's ruling that a 'structured' transaction is illegal evasion of the Reporting Act, and no avoidance. This view, which has elsewhere been labeled the 'sensible, substance-over-form approach,' has been followed by several other courts. See United States v. Cook, supra; United States v. Tobon-Builes, supra; United States v. Puerto, 730 F.2d 627 (11th Cir.), cert. denied U.S., 105 S.Ct 162, 83 L.Ed.2d 98 (1984); United States v. Sanchez-Vazquez, 585 F. Supp. 990 (N. D. Ga. 1984); United States v. Konefal, 566 F. Supp. 698 (N.D.N.&.1983). We can only say that, as applied to the present situation, we disagree for the reasons stated herein. Between a 'sensible' and a constitutional approach there should be no doubt as to which avenue we must choose. See Tennessee Valley Authority v. Hill, Supra, 437 U.S. at 195, 98 S. Ct. at 2303."

And that quotation is found in the *Anzalone* case at page 683 (footnotes omitted).

We agree particularly with the following additional language from *Anzalone*, supra, at page 682:

> "If the government wishes to impose a duty upon customers or other participants in the transaction to report structured transactions, let it require so in plain language. It should not attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction past the breaking point to accommodate the government's interpretation."

Accordingly, today we do grant the defendants' motion to dismiss this indictment.

Court's adjourned.

C-E-R-T-I-F-I-C-A-T-E

I hereby certify that the foregoing is a true and correct transcript of my Stenotype notes of Bench Memorandum given by the Honorable Maurice B. Cohill, September 30, 1985 at Pittsburgh, Pennsylvania, in the case of the United States of America versus Harry H. Jessup and Rose Jessup, Criminal Action Number 85-150.

Daniel D. Harrington
Official Court Reporter

EXHIBIT K

CONSTITUTIONAL PROVISIONS

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Military, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

EXHIBIT L

STATUTES INVOLVED

The following sections of title 18 of the United States Code are involved:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeaner.

§ 922 (1) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States

or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

§ 924. Penalties

(a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

§ 925. Exceptions: Relief from disabilities

(a)(1) The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

(d) The Secretary may authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the person importing or bringing in the firearm or ammunition establishes as the satisfaction of the Secretary that the firearm or ammunition —

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

(2) is an unserviceable firearm, other than a machinegun as defined in section 5845(b) of the Internal Revenue Code of 1954 (not readily restorable to firing condition), imported or brought in as a curio or museum piece; (3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms; or

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition.

The Secretary may permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.

The following section of Title 26 United States Code is involved:

§ 5844. Importation

No firearm shall be imported or brought into the United States or any territory under its control or jurisdiction unless the importer establishes, under regulations as may be prescribed by the Secretary, that the firearm to be imported or brought in is —

(1) being imported or brought in for the use of the United States or any department, independent establishment, or agency thereof or any State or possession or any political subdivision thereof; or

(2) being imported or brought in for scientific or research purposes; or

(3) being imported or brought in solely for testing or use as a model by a registered manufacturer or solely for use as a sample by a registered importer or registered dealer; except that, the Secretary may permit the conditional importation or bringing in of a firearm for examination and testing in connection with classifying the firearm.